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Sent: Thursday, June 14, 2012 3:10 PM
To: Judson Victoria A; Cook Janine; Lerner Lois G; Marks Nancy J
Subject: 501(c)(4)s - From the Nonprofit Law Prof Blog

Don't know who in your organizations is keeping tabs on c4s, but since we mentioned potentially addressing them (off - plan) in 2013, I've got my radar up and this seemed interesting...

Bad News for Political 501(c)(4)s: 4th Circuit Upholds "Major Purpose" Test for Political Committees

In a case with potentially major ramifications for politically active section 501(c)(4) organizations, the U.S. Court of Appeals for the Fourth Circuit has upheld the Federal Election Commission's "major purpose" test for determining whether an organization is a political committee or PAC and so subject to extensive disclosure requirements. As described in the opinion, under the major purpose test "the Commission first considers a group's political activities, such as spending on a particular electoral or issue-advocacy campaign, and then it evaluates an organization's 'major purpose,' as revealed by that group's public statements, fundraising appeals, government filings, and organizational documents" (citations omitted). The FEC's summary of the litigation details the challenge made in this case:

A group or association that crosses the \$1,000 contribution or expenditure threshold will only be deemed a political committee if its "major purpose" is to engage in federal campaign activity. [The plaintiff] claims that the FEC set forth an enforcement policy regarding PAC status in a policy statement and that this enforcement policy is "based on an ad hoc, case-by-case, analysis of vague and impermissible factors applied to undefined facts derived through broad-ranging, intrusive, and burdensome investigations . . . that, in themselves, can often shut down an organization, without adequate bright lines to protect issue advocacy in this core First Amendment area." [The plaintiff] asks the court to find this "enforcement policy" unconstitutionally vague and overbroad and in excess of the FEC's statutory authority.

In a unanimous opinion, the court concluded that the FEC's current major purpose test is "a sensible approach to determining whether an organization qualifies for PAC status. And more importantly the Commission's multi-factor major-purpose test is consistent with Supreme Court precedent and does not unlawfully deter protected speech." In doing so, the court chose to apply the less stringent "exacting scrutiny" standard instead of the "strict scrutiny" standard because, in the wake of Citizens United, political committee status only imposes disclosure and organizational requirements but no other restrictions. While the plaintiff here (The Real Truth About Abortion, Inc., formerly known as The Real Truth About Obama, Inc.) is a section 527 organization for federal tax purposes, the same test would apply to other types of politically active organizations, including section 501(c)(4) entities.

Hat Tip: Election Law Blog

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